

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Improving Public Safety Communications)	
in the 800 MHz Band)	
)	WT Docket No. 02-55
Consolidating the 900 MHz Industrial/Land)	
Transportation and Business Pool Channels)	
_____)	

FURTHER COMMENTS OF EAST BAY MUNICIPAL UTILITY DISTRICT

East Bay Municipal Utility District (interchangeably “EBMUD” or “District”), through counsel, and pursuant to Section 1.415 of the Commission’s rules, 47 C.F.R. §1.415, and in furtherance of the Commission’s Order of January 16, 2003, DA 03163,¹ hereby files its Comments on the revised “Consensus Plan” filed with the Commission on December 24, 2002.

1. EBMUD Has An Established And Continuing Interest In This Proceeding

The District has been an active participant in each stage of these proceedings involving reallocation of the 800 MHz band. In doing so, it has explained its status as a publicly owned utility that provides potable water services to 1.3 million customers located over its 325 sq. mile service area. It noted further that it owns and operates an extensive communications network that is an integral part of its water operations, which includes a number of 800 MHz facilities. Finally, EBMUD has emphasized its continuing concern that final resolution of these matters should neither disrupt its operations nor cause it to suffer financial harm.

¹ Pursuant to Delegated Authority, the Order was issued by the Chief, Public Safety and Private Wireless Division, WTC.

2. Status Of The Proceeding

This phase of the rebanding proceeding commenced with the filing of a so-called “Consensus” Plan, submitted on August 7, 2002 during a previously designated Reply phase.² It offered modifications to the earlier unsolicited proposal filed by Nextel, and signaled an attempt by the 14 signatories thereto to resolve certain contentious issues.

EBMUD was among numerous parties offering Further Comment on the modified rebanding proposal through its filing of September 23, 2002. There it continued to raise concerns about a forced relocation in 800 MHz band, and argued that the proposal was patently unfair, and inconsistent with long-standing Commission policy since it would cause financial harm to non-offending incumbent licensees. Moreover, the District argued the Compromise ignored rights of incumbent Critical Infrastructure Providers – such as the EBMUD – which are clearly recognized as public safety licensees under Congressional directives,³ but not included in the proposed defrayal of all costs associated with mandatory relocation. In addition, the District noted that the proposal was unclear on how licensees could be guaranteed that their facilities and operations – especially those involving public safety and life – would continue to operate seamlessly during what assuredly will be a highly involved relocation process. Beyond those direct issues, EBMUD also adopted arguments by various other parties on a number issues including, but not limited to, the following:

² The Commission notes correctly that while the parties style themselves as a “Consensus”, the term as used in this context should merely denote the signatories reached a consensus on the *their* filing, and that the Plan filing does not represent a consensus reached by all parties participating in this proceeding. (See DA 03-19, January 3, 2003)

³ See Balanced Budget Act of 1997, Pub. L. No. 105-33, Sec. 3004(a).

(1) Cost Uncertainty – Whether the actual cost of the contemplated relocations (i.e., whether \$500 million or upwards of \$5 billion) could or would be adequately determined; and

(2) Further Proceedings Required – Indeed, the signatories to the Compromise have previously acknowledged that even with Commission adoption of the Plan, additional proceedings would be required.

Chiefly because of all of these reasons, EBMUD continued to voice its opposition to adoption of the Compromise Plan, and argued that the FCC was duty bound to chose less onerous and/or harmful alternatives in its effort to resolve growing interference problems in the 800 MHz band.

3. The Revised Compromise (Consensus) Plan

The proponents state they have had an opportunity to more fully develop certain aspects of the Plan, and now propose to:

- (a) Fund the costs of all licensees relocating under the Plan;
- (b) Develop suggested timelines and mechanics for relocating licensees;
- (c) Implement a plan on adjacent Border Areas;
- (d) Address rights and obligations of licensees during and after realignment; and
- (3) Relocate SMR licensees from newly designated NPSPAC channels.

They state further the Compromise is the only Plan that will achieve the Commission's goals in this proceeding, in that: it articulates a comprehensive solution that reflects the participation and contributions of the full range of 800 MHz licensees; the provisions are interrelated and every part of the Plan works with every other part;

each part is an essential component; the Plan ensures that no incumbent licensee will lose spectrum as part of the rebanding; the allocation will mitigate the interference of Commercial Mobile Radio Service (CMRS) with public safety operations; and it will minimize disruption of incumbent licensees.

Finally, the Plan's signatories caution that "any" material modification will cause the Plan -- including proposed commitments and cooperation among the parties -- to dissolve.⁴

Significantly, and with a cursory reading, it appears Nextel recognizes the need to ensure that all incumbent licensees avoid bearing "any" costs associated with a mandatory location. However, a more detailed analysis reveals something substantially different, and a Plan with serious defects.

As presently framed, the Plan contemplates that "...Nextel will fund up to a total of \$850 million [for required relocation of 800 MHz licensees] of which \$700 million is dedicated for public safety licensees and \$150 million is dedicated for non-public safety licensees.⁵ The proponents state further that they are highly confident the proposed funding will cover reasonable costs of retuning facilities and/or the relocation of incumbent licensees.

To effectuate the funding aspect of the Plan, the parties propose the establishment of a Relocation Fund⁶ that will be managed by a Fund Administrator. Said Administrator

⁴ See Supplemental Comments of the Consensus Parties, December 24, 2002, at 4. [hereinafter Supplemental Comments]

⁵ *Id.* at 5.

⁶ This Relocation Fund is separate from the Relocation Coordination Committee, discussed at p. 9, below.

will (must) be acceptable to Nextel, and subject to the reasonable consent of APCO, IACP, IAFC, IMSA and the Private Wireless Coalition.⁷ Within five days of issuance of a Commission Order adopting the Plan, Nextel will pay an amount of \$25 million to activate the fund, with periodic contributions to be made at some point in the future.

Apparently to address the issue of readily available and secure funds, the proponents propose that Nextel will securitize the promised funding by pledging specific assets, and then establishing a separate entity to hold the designated assets. In the event Nextel fails to meet payment obligations, an agent or escrow agent⁸ will be empowered to sell the assets and hold the proceeds for the benefit of the pre-approved Fund Administrator. Finally, in an effort to “cement” the proposed funding, Nextel will relinquish 10 MHz of spectrum in the 1.9 GHz band it purchased at auction for \$354,711 in 2000 and 2001.⁹

EBMUD submits that numerous issues remain unresolved. Moreover, the revised Plan has raised new issues involving funding, the introduction of new (presumed to be created) entities, and waivers of certain governmental restrictions/obligations which – taken as a whole – make the Plan fault prone and inherently flawed.

⁷ Proponents of and signatories to the Compromise Plan.

⁸ The record is unclear as to whether a simple agency is to be created or a formal escrow is to be established as part of this contemplated securitization

⁹ Supplemental Comments at 8. Though not stated in specific terms, there is the suggestion that this spectrum has the same value in today’s market (or more) as it had at the time of purchase in 2000 or 2001.

Unresolved Funding Issues

Assuming *arguendo* (and for our purposes here only) the parties can meet the test of showing the ready availability and security of funds to cover *all costs associated with relocation*, the proposal yet raises substantial questions.

Determining Actual Cost

The increase of funds from \$500 million to \$700 million for public safety relocation reflects, minimally, one of two things, viz: (i) an acknowledgement that the original figure of \$500 million was insufficient to underwrite relocation costs; or (ii) that a combination of too low a projection coupled with the present value of money caused the amount to increase by \$200 million. Is the present projection also off by the same 40% as apparently the earlier estimate?¹⁰ The immediate response is likely dictated by a position in support of or opposition to the Plan. Notwithstanding, this matter cannot appropriately receive any further Commission consideration until this threshold question and been addressed and satisfactorily answered.¹¹

Proposal Does Not Cover *All* Costs

The proponents state that Nextel will fund the required relocation of 800 MHz incumbent licensees *up to a total of \$850 million, of which \$700 million dedicated for public safety licenses and \$150 million dedicated for non-public safety licensees.*¹²

Of course, such a presumption is not borne out by the facts or present market conditions in the telecom sector.

¹⁰ Some have previously argued that the likely costs of rebanding the 800 MHz spectrum could be as high as \$5 billion, a figure much higher than the amounts contained in the revised Plan.

¹¹ The District is uncertain of its actual costs (equipment/ retuning/relocation, but excluding technical and professional costs), and is conducting an internal assessment in this regard.

¹² Supplement Comments at 5.

However, the Commission assuredly will take notice of the fact that resolving disputes over system relocation costs has never been, and, based on prior experiences, nothing less contentious or confused should be expected in this instance.

The revised Plan states it will pay “reasonable” costs associated with relocation, and this is based on cost information Nextel collected from the Consensus Parties. It then conducted an analysis covering equipment and services (handsets, types, base stations and transceivers, code plugs, hardware and software, consulting and actual retuning) and has compiled guidelines as to reasonableness. Who determines what is “reasonable”, and how are the parties to resolve disputes that arise – particularly recognizing that even reasonable parties operating in good faith often disagree over costs? Under the Plan, parties are required to submit to some form of mandatory “baseball type”¹³ arbitration which, the proponents acknowledge, may not be available/applicable to public safety licensees that are governmental agencies or other entities subject to state, municipal or other laws or regulations limiting their participation in binding arbitration proceedings.¹⁴ Then how is it resolved? The Plan includes an incentive to enter into arbitration since it contains an automatic license cancellation provision. In other words, the Plan requests (requires) the FCC to include in its rules a procedure that automatically terminates a

¹³ Under their explanation, “baseball-type” arbitration requires each side to submit its best proposal, and the arbitrator is required to select one or the other. Put differently, the arbitrator cannot pick and choose from among the competing proposals, nor can the arbitrator develop its own.

¹⁴ Supplemental Comments at 22, *fn*36.

licensee's right in its license(s) where the parties cannot reach an agreement on disputed costs within a 13-month period ,¹⁵ and the matter is not in arbitration.

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Put simply, the Commission does not have the authority to terminate a licensee's rights because it is engaged in a private dispute with another licensee over the reasonableness of costs. Such an approach is neither proper under the rules nor is it workable.

Where the parties are unable to find a common ground on costs, it is reasonable to assume that total amounts (because of disputed increases) will exceed the ceiling posited by the proponents in the revised Plan. How, then, is the overage to be underwritten, or are licensees simply expected to absorb all costs once the Fund is exhausted (without regard to whether the Fund ever reaches a figure of \$850 million). As EBMUD has noted from the outset of this proceeding, it believes strongly that it (as a non-offending licensee) must not be required to absorb any costs associated with mandatory relocation, and is adamantly opposed to any such possibility.

Status Of Critical Infrastructure Licensees

EBMUD has previously noted that critical infrastructure providers are properly classified as public safety entities under the broadened definition of public safety.¹⁶ While this fact is a matter of record at the Commission, it is not clear this policy has been accepted in the revised Plan. This oversight must be resolved since the status of a

¹⁵ *Id* at 24.

¹⁶ *See* Reply Comments of East Bay Municipal Utility District, June 5, 2002 , at 5.

licensee (public safety v. non) impacts directly on protections a licensee may reasonably expect and policies require.¹⁷

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Scheduling Uncertainty

The proponents acknowledge that realignment cannot and will not proceed until the funding is available.¹⁸ However, there is no schedule for funding beyond the \$25 million to be deposited within five days after the Commission issues a Final Order. The timing of funding and required stages must be resolved with certainty before the Commission further considers the revised Plan.

New Entities And Presumed Commission Agreements

Various new entities are proposed as part of this revised Plan, including a Relocation Coordination Committee (RCC) and a Fund Administrator. The FCC is to appoint members to the five member Committee, though their categories of membership (and some organizational representation) are dictated under the Plan the Commission is being asked to adopt.¹⁹ This RCC will then establish Phase Planning Committees that, in turn, are to adhere to the strict timing guidelines set out in the draft rules. For its part, the Commission has been asked to “agree” to use its “best efforts” to process all relocation applications within 60 days from date of filing in order to minimize disruptions to licensees being asked to relocate.

¹⁷ For example, the Relocation Coordination Committee (under the revised Plan) may impose certain burdens of proof (duty to demonstrate need) on certain relocation requests by “non-public safety systems”.

¹⁸ Supplemental Comments at 12.

¹⁹ *Id* at pp. 15-16.

These newly created quasi-regulatory bodies are then expected to assist in resolving cost disputes (particularly for governmental entities that may be barred from

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binding arbitration), act impartially on requests to relocate that may be inconsistent with the perceptions of the Plan's proponents (from whom the members have been appointed) and, further, have requested inclusion of summary adjudicatory determinations in the rules (i.e., license cancellations after 13 months without the filing of a relocation plan and/or resolution of cost disputes). The proposed draft rules appear silent on appeals from adverse decisions by the RCC or any entity acting on its behalf or under its authority. A lack of recourse under the circumstances here proposed is wholly untenable.

Conclusion

The foregoing evidences the fact that the revised "Consensus" (Compromise) Plan is flawed, and cannot be accorded further consideration until the matters discussed herein are addressed and satisfactorily resolved.

WHEREFORE, the premises considered, the District requests the Commission fully consider its concerns and opposition as hereinbefore set out.

Respectfully submitted,

EAST BAY MUNICIPAL UTILITY DIST.

By: _____/s/

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February 10, 2003